No. 82-1424

In the Supreme Court of the United States

OCTOBER TERM, 1982

ROOSEVELT CHAMBERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was subjected to a seizure regulated by the Fourth Amendment when he was approached by a police officer who asked whether petitioner was willing to speak to him.

2. Whether petitioner's flight from a police officer effectively revoked the consent he had given the officer to search his suitcase.

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. C 1-4) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1982. The petition for a writ of certiorari was filed on February 25, 1983, as of February 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following denial of his motion to suppress contraband found in his suitcase (Pet. App. A 1-9) and a nonjury trial in the United States District Court for the District of Oregon,

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[1]Pursuant to 9th Cir. R. 21, the opinion of the court of appeals lacks precedential value.

petitioner was convicted of interstate travel to promote racketeering, in violation of 18 U.S.C. 1952(a)(3). He was sentenced to four years' imprisonment and a fine of $10,000. The court of appeals affirmed (Pet. App. C 1-4).

1. The evidence at the suppression hearing showed that on September 15, 1981, Sheriff Ralph Capone was detailed to the Ft. Lauderdale, Florida, airport narcotics unit. At approximately 9:00 p.m. he was watching travelers at the Delta Airlines ticket counter when he observed petitioner approaching the counter and purchasing a one way ticket to Portland, Oregon (Tr. 3-7). Petitioner paid for the ticket with an American Express Card and checked one suitcase. The suitcase was placed on a luggage conveyor belt. Petitioner retained his attache case, the only other piece of luggage he had been carrying (Tr. 7-8).

After purchasing the ticket, petitioner walked toward the departure area (Tr. 8). At this point, Sheriff Capone approached petitioner, displayed his badge and identification and stated, "I am a deputy sheriff. Would you mind speaking to me?" (Tr. 9). Sheriff Capone was dressed in plain clothes, did not display a weapon, and spoke in a normal tone of voice (Tr. 9, 22). Petitioner responded, "[s]ure, I will talk to you" (Tr. 9). Sheriff Capone then asked to see petitioner's ticket and some identification. Petitioner turned over his ticket only, which Sheriff Capone examined and returned (Tr. 9-10).

Sheriff Capone explained to petitioner that he was investigating possible narcotics violations and asked permission to search the suitcase petitioner had checked and his attache case. Petitioner replied, "[y]ou can look in my baggage" (Tr. 10). At this point, Capone signaled to a colleague, Ft. Lauderdale Police Officer John Jenkins, to retrieve the checked suitcase from the conveyor belt (Tr. 10, 39). Sheriff Capone asked petitioner if he would follow him to a small

room near the Delta ticket area (Tr. 11). Capone and petitioner had each taken one step toward the room, when petitioner suddenly turned and bolted. Petitioner left the terminal and climbed over a chain link fence, dropping his attache case on the way over. He landed in a rental car parking lot. Sheriff Capone pursued, but he slipped and fell and was unable to catch petitioner (Tr. 11-14). After looking through the parking lot, however, Capone found a crumpled car rental receipt and petitioner's wallet (Tr. 14-15, 40).

While petitioner was fleeing, Officer Jenkins picked up the checked suitcase. When Sheriff Capone returned from the parking lot, the two men searched the suitcase and found two kilograms of cocaine (Tr. 16-17, 39).

2. Prior to trial, petitioner moved to suppress the cocaine, contending that he was illegally detained by Sheriff Capone at the airport and that he did not freely consent to the search of the suitcase. In the alternative he argued that he had effectively revoked his consent when he fled. The district court rejected each of these contentions. The court concluded (Pet. App. A 8; Tr. 78) that petitioner was not seized by Sheriff Capone in the initial encounter. The court found that petitioner had voluntarily consented to speak with Capone and that he had consented to the search of the suitcase. In addition the court held that petitioner had abandoned the suitcase when he fled. For all of these reasons, the district court found no Fourth Amendment violation and denied petitioner's motion to suppress (*ibid.*).

c. The court of appeals affirmed. It too ruled (Pet. App. C 1) that "the initial encounter between [petitioner] and the law enforcement officer did not constitute a seizure." It noted (*id.* at C 2-3) that petitioner's "mobility was not impaired, the questions were routine and brief, the atmosphere was not 'dominated' by law enforcement personnel,

and [petitioner] agreed to answer questions 'in a spirit of apparent cooperation' " (citations omitted). Accordingly, the court held that petitioner's consent to the search of his suitcase was not tainted (*id.* at C 3-4). The court of appeals also upheld the district court's finding that petitioner had voluntarily consented to the search of his suitcase (*id.* at C 4). Finally, the court of appeals rejected (*ibid.*) petitioner's contention that his "subsequent flight acted to revoke his earlier consent to the search of the suitcase."

ARGUMENT

1. Petitioner contends (Pet. 6-16) that his encounter with Sheriff Capone at the Ft. Lauderdale airport constituted an unlawful seizure. He had asked the Court to hold his petition pending disposition of *Florida* v. *Royer*, No. 80-2146 (which was decided March 23, 1983), arguing that this Court's decisions established no authoritative test for determining when a person has been seized. The Court's recent decision in *Royer*, however, only confirms that the court of appeals' decision is correct.

This Court has long recognized that not every encounter between a citizen and a police officer constitutes a seizure within the meaning of the Fourth Amendment. "Only when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968); see also *id.* at 32-33 (Harlan, J., concurring); *id.* at 34 (White, J., concurring); *Sibron* v. *New York*, 392 U.S. 40, 63 (1968). As Justice Stewart explained in *United States* v. *Mendenhall*, 446 U.S. 544, 554-555 (1980) (footnotes omitted):

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. * * * In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

In *Florida* v. *Royer, supra*, a majority of the Court endorsed the standard delineated by Justice Stewart for differentiating consensual police-citizen contacts from seizures subject to the requirements of the Fourth Amendment. Slip op. 5-6, 10 (opinion of White, J.); *id.* at 2 (Blackmun, J., dissenting); *id.* at 5 n.3 (Rehnquist, J., dissenting). This is precisely the standard applied by the court of appeals (Pet. App. C 2) and by the district court (Pet. App. A 6-8). The fact-bound question whether that standard was correctly applied on the record of this particular case does not warrant further review. As Justice White explained in *Royer*, slip op. 15, there is no "litmus-paper test for distinguishing a consensual encounter from a seizure * * *. [T]here will be endless variations in the facts and circumstances [of airport encounters such that] it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question" whether there has been a seizure.

In any event it is clear from the record of this case that the court of appeals and district court correctly concluded that Sheriff Capone's approach to petitioner did not effect a seizure. None of the factors enumerated by Justice Stewart in *Mendenhall* that might indicate that a seizure had occurred was present here. Sheriff Capone did not display a weapon and made no physical contact with petitioner. He

spoke in a conversational tone of voice and he requested, rather than demanded, that petitioner answer his questions. Petitioner's response, "[s]ure I will talk to you" (Tr. 9), reflects, moreover, that petitioner understood the Sheriff's statement as a request. Nor are the factors that led Justices White, Marshall, Powell, and Stevens to conclude that the bounds of a consensual encounter had eventually been exceeded in *Royer*, slip op. 10 (opinion of White, J.), present here. Sheriff Capone returned petitioner's ticket to him prior to requesting his consent to a search of his luggage. And petitioner freely consented to that search while still in the public area of the airport, and before Sheriff Capone asked him if he would follow him to a room off the concourse. In short, at the relevant juncture, when petitioner gave his consent to search of his luggage, there were no circumstances that would have led a reasonable person, innocent of crime, in petitioner's situation to conclude that he was not free to leave. Petitioner's consent is accordingly untainted by an illegal seizure.[2]

2. Petitioner also claims (Pet. 18) that even if he was not seized, he revoked his consent to search the suitcase when he fled. As the courts below agreed, this contention is unsound. Petitioner never revoked his consent verbally, and his flight

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[2]Because petitioner was not seized at the time he consented to the search, there is no reason to consider petitioner's contention (Pet. 16-18) that Sheriff Capone lacked sufficient grounds to suspect petitioner of a crime at the moment he first approached to justify an investigative detention.

We note that petitioner freely consented to accompany Sheriff Capone to the room off the concourse so that the search could be completed. See pages 2-3, *supra*. This case differs in this respect from *Royer*, slip op. 10 (opinion of White, J.). But even if petitioner were deemed to have been seized when he was asked to accompany Capone, the analysis is unaffected, for petitioner's consent to the search of his luggage, which antedated that request, plainly cannot be considered a fruit of any seizure that followed.

merely evidenced an intent to abandon any expectation of privacy that he may have had in the suitcase. See *Hester* v. *United States*, 265 U.S. 57, 58 (1924); *United States* v. *Brown*, 663 F.2d 229, 231 (D.C. Cir. 1981) (en banc); *United States* v. *McLaughlin*, 525 F.2d 517, 519 (9th Cir. 1975); *United States* v. *Wilson*, 492 F.2d 1160, 1162 (5th Cir.), cert. denied, 419 U.S. 858 (1974). Petitioner's actions were plainly inconsistent with an intent to exercise control over the suitcase. In the circumstances, the officers, who had by then acquired probable cause as a result of petitioner's flight, were free to search the suitcase without a warrant.

CONCLUSION

The petition for a writ of certiorari be denied.

Respectfully submitted.

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